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# DEPARTMENT OF COMMERCIAL LAW.

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## WESTERN UNION TELEGRAPH COMPANY *v.* CORNWALL.[1] COURT OF APPEALS, COLORADO.

*Contracts, Breach of—Telegraph Companies—Delay in Transmitting Message.*

C left a despatch at defendant's telegraph office in S., to be forwarded to plaintiff at M. The despatch was "Strauss gone to Howard. Gave man gold watch by mistake. Left no word with me. Store closed. Answer." Strauss was a clerk whom plaintiff had left in charge of his jewelry store in his absence, and during the night or early in the morning before the despatch was sent had robbed the store and absconded with the property, and the despatch was in relation to the absconding, but defendant's agent had no notice thereof. The despatch remained in the S. office an hour and was then forwarded to the M. office, where it remained two hours before it was delivered, or any effort made to deliver it. On receiving the despatch, plaintiff had further communication with C, and then went to S, where he ascertained the fact of the robbery. After telegraphing to various points for the arrest of Strauss, plaintiff went to P, and waited several hours for answers, but, receiving none, went on to D, leaving no address at P. After his departure, despatches announcing the arrest of Strauss, with the property in his possession, reached P, but as they could not be forwarded to plaintiff, they remained unanswered, and the sheriff, hearing nothing from plaintiff, had to discharge Strauss. When subsequently re-arrested he had disposed of most of the goods. *Held*, that plaintiff could not recover more than the cost of the message and incidental expenses, upon the principle that where two persons have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

*Held*, further, that the defendant was not liable, because the robbery was prior to the sending of the message to plaintiff; and, also, because the plaintiff had been negligent in leaving no address at P.

Opinion by REED, J.

[1] 31 Pac. Rep., 393; AMERICAN LAW REGISTER AND REVIEW, *supra*, 80. Decided October 24, 1892.

RESPONSIBILITY OF TELEGRAPH COMPANIES FOR DELAY IN TRANSMITTING MESSAGES.

In the above case the decision is placed upon three distinct grounds:

*First.*—The operator had no notice, either from the wording of the telegram or from anything that the sender told him, that a loss would result from a failure to transmit and deliver the message promptly.

*Second.*—The loss of the goods had occurred before the telegram was sent, and hence could not be ascribed to any failure of duty on the company's part.

*Third.*—The plaintiff's failure to recover his property was due to his own negligence in leaving no address at Pueblo, so that the despatches stating the arrest of the thief and the recovery of the goods failed to reach him.

Taking these reasons in inverse order, the last is so indisputable that it is hard to see why the Court rested the decision on any other ground. The soundness of the second reason—that even if the company had been negligent, the loss was not due to this fact, but to the crime of Strauss—may be seriously doubted; for the question was not whether the telegram, if delivered promptly, could have prevented the goods from being stolen in the first instance, but whether the delay prevented their recovery. The non-recovery of the goods, not the theft of them, was the injury for which the plaintiff sought to hold the company liable. As, however, this second reason was not essential to the decision, its correctness is of no practical importance here.

The first reason was equally unnecessary to the decision of the case, but it touches an interesting point of the law of communication by telegraph, viz., the liability of a telegraph company for the consequences of delay in the transmission or delivery of a message of whose importance the company is ignorant.

It may here be mentioned incidentally that it is now regarded as settled in the United States that the measure of damages is the same whether the action is brought by the sender or the receiver of a message, and whether it is in contract or in tort: Gray on Communication by Telegraph, § 80; 2 Sedgwick on Damages, 8th ed., § 878; see W. U. Tel. Co. *v.* Adams, 75 Texas, 531; W. U. Tel. Co. *v.* Beringer, 84 Texas, 28.

No distinction seems ever to have been taken between the liability of a telegraph company for mistakes in the transmission of a message and its liability for delay; yet it is clearly much more reasonable to take the company's knowledge or ignorance of the meaning and importance of a message into account in the one case than in the other, for while such ignorance cannot possibly occasion delay, it may greatly increase the risk of error, it being obvious that a mistake is much less likely to be made, or if made, to remain undetected, when the words of a telegram convey a clear impression of its meaning or, as the phrase is, "make sense," than when they do not. In the present note, therefore, in reviewing the principal cases on liability for delay as affected by knowledge or ignorance, cases on liability for mistake will be referred to only by way of illustration, and not

cited as authority. The reasonableness of the decisions in the former class of cases can be best judged of by keeping the two classes distinct.

A well-known line of cases holds that the damages for the delay of a telegram cannot exceed the amount which the telegraph company might, from such knowledge of the purpose of the telegram as could be gathered from its language, or was imparted to the operator, naturally expect would follow from such delay. Thus in Landsberger *v.* Mag. Tel. Co., 32 Barb. (N. Y.), 530 (1860), where the despatch was, "Get ten thousand dollars of the Mail Company," it was held that the only consequence of delay to be naturally expected was the plaintiff's inability to obtain the money during the period of the delay, and that the measure of damages was the interest on the money for that period and the sum paid for the despatch. The plaintiff's losses through inability to carry out a certain contract, on account of not having the money in time, were held to be something outside the natural contemplation of the telegraph company and, therefore, not recoverable.

This decision is avowedly based on the rule of damages laid down in Griffin *v.* Colver, 16 N. Y., 489. Suit was there brought for delay in completing a steam engine ordered for the plaintiff's planing mill, and it was held that "the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation." The same rule is adhered to in the cases which follow Landsberger *v.* Mag. Tel. Co., though it is more usually referred to as the rule in Hadley *v.* Baxendale, 9 Exch., 341. The rule is there expressed somewhat differently, the damages (in that case for a carrier's delay in delivering goods) being stated as "such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it." In other words, damages for the natural consequences of delay are allowed in all cases, while if the consequences of delay be magnified by the special circumstances of the case, damages are recoverable only in so far as the defendant knew or ought to have known what those special circumstances were. The two statements would seem, however, to cover the same ground, for every man is held in law to contemplate the natural (*i. e.*, ordinary or usual) results of his breach of contract, while, to the extent to which he is informed of the special circumstances of the contract, other consequences also will be to him "such as might naturally be expected to follow its violation."

The decision in Landsberger *v.* Mag. Tel. Co., and its application of the rule in Hadley *v.* Baxendale, have been cited and followed in several cases. Thus, in U. S. Tel. Co. *v.* Gildersleeve, 29 Md., 232 (1868), an order to sell $50,000 in gold had been sent in the words "sell fifty gold." This would have been understood by the addressee or any broker, but was not explained to the operator. The jury was instructed that the plaintiff was

entitled to recover the full amount of his loss from the decline in gold after the time the message should have arrived, but the Court of Appeal reversed the judgment, and said, "'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars by those not initiated. And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this despatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk."

In Baldwin *v.* U. S. Tel. Co., 45 N. Y., 744 (1871), an inquiry about an oil well was delayed, so that the plaintiff sold his interest for much less than he could have got had the message arrived in time. Suit having been brought for the amount of the difference, it was held that whatever might have been the purpose in sending the telegram, the company "had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant."

In Candee *v.* W. U. Tel. Co., 34 Wis., 471 (1874), the message contained an order, in cipher, to buy 250 shares of a certain stock. The court held that only the price paid for the telegram could be recovered, saying: "It cannot be said or assumed that any amount of damages or any pecuniary loss or injury will naturally ensue or be suffered according to the usual course of things from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator . . . cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect of which pecuniary loss or damages will naturally arise in case of his failure or omission to send it."

In Mackay *v.* W. U. Telegraph Co., 16 Nev., 222 (1881), the message was a cipher order to sell certain mining stock. The Court held, on the authority of the decisions in the other States, "that unless the importance of the message is shown, either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for the purpose," and that the admission of the defendant's manager, that he generally supposed such despatches related to stocks or mining business, was insufficient to impose any liability on the company.

The same view of the law has been held in Dorgan *v.* W. U. Tel. Co. (C. C., S. D., Ala., 1874), 1 Am. L. T. N. S., 406 (a cipher despatch); McColl *v.* same, 12 J. & S. (N. Y.), 407 (1879): Daniel *v.* same, 61 Tex.,

452 (1874, a cipher despatch). Also in Kinghorne *v.* same, 18 U. C. Q. B., 60; All. Tel. Cas., 98 (1859); Stevenson *v.* Mont. Tel. Co., 18 U. C. Q. B., 60; All. Tel. Cas. 7 (1858); Beaupré *v.* Pac. & Atl. Tel. Co., 21 Minn., 155 (1874); Bank *v.* W. U. Tel. Co., 300 St., 355 (1876); Behm *v.* same, 8 Biss., 131 (1878); W. U. Tel. Co. *v.* Hall, 124 U. S., 444 (1887); Cahn *v.* W. U. Tel. Co., 48 Fed. R., 810; in which cases, however, the remarks of the Court were *obiter*, the decisions being, in each instance, that the plaintiff's case lacked even the evidence required by his own view of the law.

If a telegraph company's liability for delay depends on its knowledge of the meaning of the message delayed, it would seem only logical that the liability should be in proportion to the knowledge, and hence not only that where a message indicates that a certain loss will result from delay, and a greater loss really results, the company will be liable for the loss indicated only (*e. g.*, see Landsberger *v.* Mag. Tel. Co., *supra*; Reliance Lumber Co. *v.* W. U. Tel. Co., 58 Tex., 394), but also that the liability should be greater where the company is informed both as to the character and amount of the probable loss than when the former only is known, and still greater than when neither is known, but only that delay may cause a loss. In point of fact, as admitted in "Gray on Communication by Telegraph," §§ 84-86, the liability is held to be precisely the same in all three classes of cases, and for the very practical reason that when once the liability for a loss due to delay is admitted, the damages must be assessed by that loss and not by the company's degree of knowledge of what that loss would be. This failure to carry out the rule to its logical consequences is illustrated in the following cases:

In Parks *v.* Alta California Tel. Co., 13 Cal., 422 (1859), the despatch was "Due 1800; attach if you can find property; will send note by to-morrow's stage." It was held that the plaintiff should have been allowed to prove that the attachment could have been made and the debt recovered but for the delay of the telegram, in order to recover damages for such delay, as he "had a right to have his message sent according to contract." This case was followed in Bryant *v.* Am. Tel. Co., 1 Daly (N. Y., 1865), 575, where, however, the plaintiff's position was even stronger, the importance of the message (which also concerns an attachment) having been impressed on the operator.

In Birney *v.* N. Y. & Washington Tel. Co., 18 Md., 341 (1862), the message was an order to sell certain shares of stock, and it was held that the defendant was "a party contracting to perform a service, within the sphere of its business, for compensation, which it fails to perform, and, for such failure, must account for any loss or injury that results from its neglect; and such loss or injury will be the measure of damages to which the plaintiff is entitled."

In U. S. Tel. Co. *v.* Wenger, 55 Pa., 252 (1867), the message clearly indicated an order to buy a certain number of shares of certain stock at a certain limit of price, and the failure to buy at the market price when the telegram should have arrived was held to have been within the contemplation of the company

as the natural result of any delay, so that the case was distinguished from Landsberger *v.* Mag. Tel. Co., and the company held liable.

In Squire *v.* W. U. Tel. Co., 98 Mass., 232 (1867), the message "on its face purported to be an acceptance of an order to sell merchandise." It was held that "the agreement was to transmit and deliver it with reasonable diligence and dispatch," that "the natural consequence of a failure to fulfill the contract was that the party to whom the message was addressed, not receiving a reply to his offer to sell the merchandise in due season, would dispose of it to another person;" so the plaintiff might have to buy at a higher price, and that for any loss thereby occasioned to the plaintiff the defendant would be liable.

In W. U. Tel. Co. *v.* Graham, 1 Col., 230 (1871), the message delayed was, "Ship oil soon as possible, at very best rate you can," and the plaintiff was allowed to recover the increased price of freight that he had had to pay and all expenses that he had incurred from the delay, but not the profits that he would have realized from an early sale of the oil.

In True *v.* Int. Tel. Co., 60 Me., 9 (1872), the message was, "Ship cargo named at ninety; if you can secure freight at ten, wire us results." The company was held liable for the plaintiff's loss of profits, such loss being the immediate and necessary result of the delay, and being fairly presumed to have been in the contemplation of the parties.

In Manville *v.* W. U. Tel. Co., 37 Ia., 214 (1879), the message was, "Ship your hogs at once," and the company was held liable for the plaintiff's failure to sell his hogs at the price he could have obtained had he received the telegram without unreasonable delay.

In Sprague *v.* W. U. Tel. Co., 6 Daly (N. Y.), 200 (1875), the message was, "Hold my case till Tuesday or Thursday; please reply," and its importance was explained to the operator. The plaintiff was allowed to recover the cost of his own and his counsel's journey to Buffalo and back, and the fee paid his counsel for going, as the journey was needless and would not have been taken had the message been sent and answered. It was also held in New York (Rittenhouse *v.* Ind. Tel., 44 N. Y., 263 (1870), that as the operator could inquire the meaning of any message, the fact that it was not intelligible to ordinary persons did not relieve the company for liability for its correct transmission.

In W. U. Tel. Co. *v.* Fenton, 52 Ind. 1 (1875), and Same *v.* McKibben, 114 Ind., 511 (1887), the messages had offered work at a certain rate of wages, and plaintiffs were allowed to recover at that rate for the time they were out of work, although in the former case there was nothing to show that the wages were monthly and not for the whole time of service.

In Thompson *v.* W. U. Tel. Co., 64 Wis., 531 (1885), the message was, "Send bay horse to-day. Mock loads to-night." It was held that as Mock was a well-known horse dealer, the company's agent must be taken to know the fact, there being no evidence to the contrary, so that "this telegram fairly conveyed the idea to the agent that this horse was wanted that day at Boscobel for the purpose of sale to Mock," and the company was held liable for the loss of the sale.

In Mowry *v.* W. U. Tel. Co., 51

Hun. (N. Y.), 126 (1889), and W. U. Tel. Co. *v.* Bowen, 84 Tex. 476 (1892), the messages were acceptances of contracts, and the defendant was in each case held liable for the loss of the contract on the ground that the offer having been made through it, it was chargeable with all the knowledge conveyed by both dispatches, as also, in the latter case, with the operator's personal knowledge of the plaintiff's business.

In W. U. Tel. Co. *v.* Brown, 84 Tex., 54 (1892), the plaintiff had sent an agent to Kansas City to buy mules, and the latter, having made a conditional purchase, telegraphed the Kansas City and St. Louis prices, asking instructions. The message was not delivered till it had been repeated, and the purchase eventually cost more. The damages were measured at the difference between the price of the mules which the agent conditionally agreed to pay, and the higher price which he would have had to pay at the time an answer to the repeated telegram might have been sent. Moreover, the plaintiff, before the hearing from his agent had contracted to sell some of the mules he expected to purchase, and he was allowed to recover the difference between the price at which he could have bought them had the telegram been delivered and that at which he had contracted to sell them, less the cost of transportation.

It is to be observed that in some of these cases the liability of a telegraph company is based rather on its duty to transmit all messages promptly than on its knowledge of their importance, and also that some of them seem to recognize a broader measure of liability than that laid down in Landsberger *v.* Mag. Tel. Co., and a tendency to depart from the strict ruling of that case. The following seems to be a fair statement of the view taken to-day by the courts that make liability depend on knowledge, although the case was one of error in transmission, not of delay:

"It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which will probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is that where a message as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused." Postal T. C. Co. *v.* Lathrop, 131 Ill., 575 (1890).

It is not surprising, however, that other courts have gone further, for while the limitation of the liability of a telegraph company by its actual or constructive knowledge of the importance of the message entrusted to it was natural enough in the infancy of telegraphy, before it had become so essential a factor in the every-day method of conducting business, and the invention had reached its present degree of perfection and the operators their present skill, yet in the course of time the necessity for holding telegraph companies to a strict per-

formance of their duty has become more evident. It is now recognized that the skill of the operators and the excellence of the instruments is such that mistake and delay are not excusable, and mean negligence, and also that the public character of telegraph companies and their exercise of the right of eminent domain involve, as a matter of public policy, liability corresponding to the privileges. See Brown *v.* Postal T. C. Co. (N. Car., 1892), 16 S. E. Rep., 179, overruling Lassiter *v.* Tel. Co., 89 N. C., 334.

Even in 1865 Prof. Dwight wrote (4 AMERICAN LAW REGISTER, N. S., 203): "The rule in Hadley *v.* Baxendale is very severe in its application to the senders of telegraphic messages. It is almost impossible, in many cases, to communicate the result of a neglect to dispatch the message. Since it has been settled that the condition requiring an important message to be repeated for an additional price is valid, it is worthy of consideration whether the telegraph company should not be held responsible for all the direct consequences following its neglect of duty, without reference to the question whether they have been contemplated by the parties or not." So in Scott and Jarnagin on the Law of Telegraphs, §§ 404-406 (1868), the impracticability of fully informing the operator as to the consequences of delay, and the fact that the companies hold themselves out to the public as prepared at all times, and for all persons, to transmit important messages, are dwelt upon, and it is urged that the damages which "may be fairly supposed to have entered into the contemplation of the parties," ought not to depend on the company's knowledge of the meaning of the telegram, but on their undertaking to transmit all messages, the most important as well as the most trivial, correctly and promptly.

So in 2 Redfield on Railways, 350 (6th ed.), it is said that the secrecy and reserve with which telegraphic correspondence is commonly conducted cannot affect the companies' liability, because they can ask for information if they choose.

The dissatisfaction expressed by these writers with the ruling in Landsberger *v.* Mag. Tel. Co., and the cases which follow it, has of late been shared by the courts of some States, and they have accordingly held that the liability of a telegraph company does not depend on the knowledge the operator may have of the contents of the message, and that the duty of prompt transmission, and the liability for the proximate results of the delay of a message of whose meaning the company knows little or nothing, and even of a message in cipher, are the same as if its contents had been either evident from its language or fully communicated: Daugherty *v.* Am. U. Tel. Co., 75 Ala., 168; W. U. Tel. Co. *v.* Way, 83 Ala., 542; same *v.* Hyer, 22 Fla., 637; same *v.* Fatman, 73 Ga., 285; same *v.* Weiting. 1 Tex. App., Civ. Cas., 444; same *v.* Reynolds, 77 Va., 173; and see same *v.* Fontaine, 58 Ga., 435; same *v.* Lindley (Ga.), 15 S. E. Rep., 636.

In the Alabama cases the opinions disclaim all intention of departing from the rule in Hadley *v.* Baxendale, but suggest that that rule has been misapplied, and that the failure to make the sales or purchases, or to secure the other benefits which the sending of the

telegram was intended to secure, are among the natural consequences of the delay, those for which, under the first part of that rule, the company would be liable without regard to its knowledge of the meaning of the message, and that the probability of such consequences is not a special circumstance requiring to be known by the company. In the Florida and Georgia cases, however, the rule in Hadley *v.* Baxendale seems to be regarded as wholly inapplicable, while in Virginia the statutory liability of telegraph companies is held to be independent of their knowledge of the meaning of messages.

The practical application of the doctrines above reviewed involves a consideration of the right of telegraph companies to limit their liability to cases where messages are repeated or specially insured, but such a consideration would exceed the space assigned to the present note.

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### UNION PACIFIC RAILWAY CO. *v.* BOTSFORD.[1] SUPREME COURT OF THE UNITED STATES.

A court of the United States, in an action for an injury to the person, cannot, on application of the defendant, compel the plaintiff to submit to a physical examination in advance of the trial.

#### STATEMENT OF THE CASE.

*Error to the Circuit Court of the United States for the District of Indiana.*

This was an action by the appellee, Clara L. Botsford, against the appellant, for negligence in the construction and care of an upper berth in a sleeping car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concus-

[1] 141 U. S., 250.